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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 28-930938
Controlled Substance Excise Tax
For The Period: 1993

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ISSUES

I. Controlled Substance Excise Tax—Liability

Authority: IC 6-7-3-5

The taxpayer protests the assessment of controlled substance excise tax.

STATEMENT OF FACTS

On September 14, 1993, a National Guard helicopter, with an Indiana State Police Officer in it, flew over a rural area of Indiana looking for marijuana plants. Several plants were spotted at the rear of a residence. The helicopter landed and the police officer radioed for additional officers. The taxpayer arrived at the home shortly after the officers did, and admitted the marijuana was his and also noted there was marijuana within the house. A total of 253.20 grams of marijuana were found. The Department of Revenue jeopardy assessed the taxpayer for Controlled Substance Excise Tax ("CSET") on September 15, 1993. The taxpayer was assessed the CSET for 253.20 grams of marijuana.

I. Controlled Substance Excise Tax—Liability

DISCUSSION

In Indiana, the manufacture, possession or delivery of marijuana is taxable. IC 6-7-3-5 (hereinafter referred to as "CSET"). Indiana law specifically provides that notice of a proposed assessment is *prima facie* evidence that the Department's claim for the unpaid tax is valid. The taxpayer then bears the burden of proving that the proposed assessment is wrong.

There are two means of avoiding the CSET assessment. The taxpayer can meet its burden and prove that it did not manufacture, possess, or deliver marijuana as required under IC 6-7-3-5. The second means of avoiding CSET is if the Department of Revenue's jeopardy assessment is not the first jeopardy to attach. There is a wealth of case law on this point (*See* Bryant v. Indiana Dept. of State Revenue, 660 N.E.2d 290 (Ind. 1995); Clifft v. Indiana Dept. of Revenue, 660 N.E.2d 310 (Ind. 1995)), and it is not necessary to recapitulate the cases. The Indiana Supreme Court has held that the CSET assessment is considered a jeopardy under Constitutional analysis when the assessment is served on the taxpayer. Conversely, the criminal jeopardy attaches when either a jury has been impaneled and sworn, or when a plea agreement has been entered into and approved by the judge. Under "double jeopardy" analysis, the first jeopardy to attach precludes the second one from attaching—though the courts may be changing their position on this when it comes to civil and criminal matters (*See* Hudson v. United States, 118 S. Ct. 488 (1997)) (holding that the double jeopardy clause protects only against the imposition of multiple criminal punishments for the same offense and then only when such occurs in successive proceedings).

The Department scheduled a hearing for May 26, 1999 at 10:00 a.m. The taxpayer's representative rescheduled the hearing for June 9, 1999. The taxpayer's representative did not arrive or telephone (telephone hearing) on that date, but later contacted the Department regarding a proposed settlement. The Department of Revenue mailed a letter dated August 3, 1999, notifying the taxpayer's representative to contact the Hearing Officer by August 20, 1999, regarding the proposed settlement. The letter stated "If the Department does not receive the written settlement proposal by August 20, 1999, the Department will schedule a hearing . . . [n]o [further] extensions of time will be granted for the hearing date." The taxpayer's representative did not contact the Department. The Department then mailed a letter scheduling the hearing for September 29, 1999, at 10:00 a.m. The taxpayer's representative missed that hearing date. The Department left a telephone message with the taxpayer's representative stating that the protest would be decided based upon the information contained within the file.

The evidence in the file indicates that: (1) the taxpayer possessed the marijuana (it was at his residence, he admitted it was his); and (2) the Department's jeopardy assessment attached first—that is, prior to any criminal jeopardy (there is nothing in the file regarding criminal jeopardy, and the Department's jeopardy attached one day after the marijuana was found). The taxpayer's representative in his original protest letter argues the assessment violates various constitutional provisions. The taxpayer's representative only intimates these arguments. The Indiana Supreme Court (*See supra*) has already dealt with some of the arguments, and the rest are beyond the purview of an administrative hearing.

FINDING

The taxpayer's protest is denied.

DP/BK/JS-991410